Understanding the Determinants of ICC Involvement: Legal Mandate, Power Politics, and the Crisis of Legitimacy

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Abstract

What explains the initiation and escalation of International Criminal Court (ICC) involvement in a situation? In light of recent charges of bias against and challenges to the institutional legitimacy of the ICC, understanding the determinants of ICC involvement is critically important. Does the ICC get involved in those situations most in need of international attention and prosecution – i.e. those with the gravest violations of human rights and the least likelihood of domestic prosecution of the perpetrators? Or, alternatively, are the Court's decisions influenced by international politics? This paper analyzes the determinants of ICC involvement and the escalation of that involvement. We test a legal mandate argument – that ICC involvement and escalation are driven primarily by the severity of human rights violations and the lack of domestic ability or will to prosecute such violations – against a power politics argument – that economic and security relations with leading states, such as the five permanent members of the United Nations Security Council (P5) impact where the ICC will initiate investigations and how far those investigations progress. Using a variety of measures for both arguments in a country-month analysis from 2002-2015, we find that the ICC's motivations are mixed. Both the gravity of human rights violations and links to the P5 influence the ICC's decision-making.

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On September 10, 2018, US National Security Advisor John Bolton issued a virulent critique of the International Criminal Court (ICC). In his speech to the Federalist Society, Bolton called the ICC "ineffective, unaccountable, and indeed, outright dangerous", and referred to the court as "fundamentally illegitimate".[1] While these statements reflect the policy positions of a US administration that is perhaps uniquely hostile to international institutions and efforts to advance international law, the critiques raised by Bolton are not new.

In fact, they mirror similar criticisms raised by a variety of states and international actors against the ICC over the past decade. In particular, criticism of the court has centered on two central issues: first, that the court is biased against African nations and other countries in the global south. This so-called "Africa bias" has prompted criticism from regional leaders such as Rwanda's Paul Kagame and key institutions, especially the African Union (*BBC News* 2012; Murithi 2012). In fact, in 2016 Burundi, South Africa, and the Gambia threatened and/or initiated proceedings to leave the ICC based upon claims of bias (Murphy 2016), and in 2018 the Philippines followed suit (Villamor 2018). The second central critique of the court, mirrored in Bolton's speech, is that it is ineffective, incapable of fulfilling its mandate to achieve justice and deter atrocities. This criticism has gained traction in recent years as arrest warrants against key heads of state such as Omar Al-Bashir continue to go unexecuted and the number of convictions remains at just four (Wang 2018; White 2018).

These challenges to the ICC's legitimacy and effectiveness raise fundamental questions about its ability to fulfill its core mission to pursue international peace and justice. Proponents of the Court argue that it is a transformational institution with unprecedented

[1]The full text of Bolton's speech is available at: https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html.

authority to investigate and prosecute perpetrators of atrocity crimes, while critics argue the Court is biased and ineffective. Recent criticism makes clear that we must first understand where the court gets involved to fully understand whether it has fulfilled its mandate to hold the worst offenders accountable and to deter grave international crimes, or whether, instead, it is a biased, ineffective institution. Existing literature provides little rigorous empirical evidence regarding which of these views is more accurate. We are thus unable to answer the most basic question about the functioning of the Court: how does the ICC choose where it will act?

This paper addresses this gap by examining how the ICC's Office of the Prosecutor (OTP)[2] selects situations for preliminary examination and formal investigation. We argue that the OTP, due to its accountability to the ICC Presidency and Assembly of States Parties (ASP), has strategic incentives to prioritize both impartiality and effectiveness when selecting situations for examination and investigation. These two priorities, however, are often contradictory: while incentives to prioritize impartiality should lead the OTP to target perpetrators of the gravest violations of human rights when states lack the willingness or ability to hold them accountable, incentives to prioritize effectiveness should lead the OTP to take powerful states' interests into account, avoiding targets who have close ties with the permanent five members of the security council (P5).[3] Thus, the

[2]As we discuss further below, the OTP has considerable discretion when it comes to determining which situations and cases it will pursue (Danner 2003; Schabas 2011; Stahn 2009). We therefore focus our theoretical argument on the OTP chief prosecutor as the key actor of interest.

[3]We refer to targeted actors rather than targeted countries, because our expectation is that the OTP will be selective in targeting either government officials or opposition groups. Specifically, if impartiality drives OTP behavior, the OTP should target whomever (government and/or opposition) is most responsible for grave human rights abuses. If the OTP is driven by effectiveness concerns, it will consider whether government or opposition groups have strong ties to P5 members before selecting targets for examination and investigation.

OTP faces a dilemma. The functional need to prove efficacy requires the chief prosecutor to tailor her behavior to the specific interests of powerful states, but doing so may backfire, compromising the impartiality and nondiscriminatory principles of her office and the institution more broadly.

We test our expectations using original data on ICC examinations and investigations from 2002 through 2015. The empirical analyses reveal several important findings. First, we do find that ICC involvement onset is more likely when the government and rebels intentionally target a greater number of civilians. Our models of the escalation of ICC involvement generally produce stronger results, and provide support for both the legal mandate and the institutional constraints framework. ICC escalation is more likely when more human rights abuses have occurred and when domestic courts are weak, but is also more likely when P5 states do not have strong ties to the targeted actor. Finally, African states are not systematically more likely to experience a preliminary examination, but they are more likely to be formally investigated by the Court, suggesting the Africa bias is more complex than previously thought.

Understanding the Court's selection process is of critical importance to both scholars and policy-makers, particularly in light of recent and growing criticism of the Court for its alleged case-selection biases. First, the paper addresses one of the key debates in contemporary scholarship and a central question among policy makers and political leaders that scholars have largely overlooked in research on the Court.[4] We find that the OTP decision-making is more nuanced than both its supports and critics claim. In line with its mandate, the OTP considers the gravest cases in the preliminary examination stage and complementarity is one of the most important factors across both stages, while major power politics are important in the formal examination stage. Taken together, the

[4]need to say something about extant research.

finding suggest that the OTP does consider its mandate especially the primacy of domestic politics, but that international politics is also an important factor in her decision-making. The results provide a middle-ground take on the OTP – the mandate is important but power politics is not absent from her calculi.

Similarly, the findings suggest that criticisms against the ICC by the United States and other states may be overstated. In particular, the OTP's behavior is clearly not arbitrary as some claim; further, and perhaps more importantly, major powers with strong domestic justice institutions, such as the U.S. appear to have little to fear from the OTP. At the same time, while Africa is certainly linked with greater OTP involvement, it is also important to note that other factors such as civilian targeting and especially complementarity also explain ICC targeting. Thus, the findings suggest that Africa is only one of many factors that explain OTP decision-making. ???

Third, this paper helps us to better conduct research on ICC effectiveness. While scholars find mixed evidence on the impact of the ICC (XX), they largely ignore the selection issue in their work - ICC involvement – which may explain the inconsistent findings. Our work on ICC targeting will help scholars better account for OTP decision-making in their models, consequently helping them to directly address the selection issue that biases existing research. In turn, this will allow us to better understand the ICC's impact on human rights and other related outcomes such as civil war duration.

Fourth, the paper has important implications for scholars studying international courts, tribunals, and related transitional justice institutions. As Romano (1999) writes, the contemporary period is marked by a transformational increase in international courts and tribunals to settle contentious issues and pursue international justice (XXX). Despite this, very little is known about the case selection process across these different institutions. While there is some literature on the behavior of international judges (XXX), scholars have dedicated little time studying the decision-making of prosecutors at the ICC as well

as other criminal tribunals such as the international criminal tribunal for Yugoslavia or the Special Tribunal for Lebanon. As this paper argues, understanding case selection is critical to understanding the effectiveness of these institutions. In particular, scholars studying these processes need to consider both mandate-based arguments and power politics to fully understand case selection. We also see that it is necessary to theoretically and empirically to analyze the different stages of case selection, as we find different results across them. These findings likely apply to other courts and tribunals as well.

Finally, we collect original data on ICC involvement and code a new estimator to more precisely test our theoretical claims.... Scholars can use the new data to test our novel theories on the ICC such as

Literature

The ICC has garnered significant attention from legal scholars, political scientists, and policy-makers since its inception in 2002. Because of its important role in international politics, scholars have examined a wide variety of questions centered on the Court, beginning with how the Rome Statute developed (Deitelhoff 2009; Fehl 2004; Goodliffe and Hawkins 2009) and why it has been ratified by so many states, given that accepting the Court's jurisdiction infringes upon state sovereignty (Chapman and Chaudoin 2012; Meernik and Shairick 2011; Simmons and Danner 2010).

Recent research has shifted toward examining the ICC's impact on key outcomes, such as achieving justice, deterrence of human rights abuses, and peace. Empirical investigations of the effects of the ICC in these areas have produced mixed results, however. Some show that ratification of the Rome Statute is associated with steps toward peace (Simmons and Danner 2010) and improved human rights practices (Appel 2018). Active involvement by the ICC in a situation has been shown to deter human rights abuses under some conditions (Bocchese 2015; Hillebrecht 2016; Jo and Simmons 2014), but to prevent

peaceful transfers of power (Ku and Nzelibe 2006; Nalepa and Powell 2015) and impede conflict resolution under other conditions (Prorok 2017).

To date, little research has focused on how the Court chooses situations and cases. While several legal scholars have debated the merits of prosecutorial discretion theoretically (e.g. Goldston 2010; SáCouto and Cleary 2007; Schabas 2008), little empirical work has been done on situation selection. The limited studies that have empirically examined OTP situation selection, furthermore, suffer from several limitations and fail to reach consistent findings on the extent to which OTP decisions are driven by legal considerations versus political constraints (see: Rudolph 2017; Smeulers et al 2015).[5] We therefore lack sound empirical evidence and clear findings on this topic.

This is a critical shortcoming in existing research for several reasons. First, before one can fully understand the ICC's effects on international peace and justice, we must understand where it gets involved. If the OTP is systematically selecting cases that are easier (or harder) to deter or resolve, this has a critical impact on the conclusions we can draw from existing studies about the ICC's ability to deter atrocities, promote peace, and achieve justice. While many existing studies do address selection concerns empirically, they use a variety of different strategies that are implemented in an ad hoc manner without a clear underlying model of OTP situation selection to guide modeling of the selection

[5]Both of these analyses are limited in several ways. For example, Rudolph (2017) ignores the onset of preliminary examinations, focusing only on escalation to formal investigations. He also treats the situation location, rather than the target of the examination, as his unit of analysis. This is problematic in the many cases where situation location and ICC target are not the same (i.e. Iraq situation focuses on UK violations, Comoros situation focuses on Israeli violations, etc.). The analysis done by Smeulers et al (2015) also suffers from important limitations. In particular, they select only the 10 "gravest" cases for analysis, thus limiting their ability to draw any conclusions about the prevalence of ICC involvement in grave versus less-grave situations.

process. This may account for conflicting results in existing research on the ICC's impact, and suggests that a clear understanding of OTP situation selection is critical not just in its own right, but as an important part of understandings the ICC's broader impact.

Second, this is a particularly troubling gap from a policy perspective, given that the Court has come under increasing scrutiny in recent years for its alleged bias toward investigating weak, poor states in the global South while overlooking violations by strong, Western nations (Murithi 2012). We have little clear, systematic evidence to either combat or confirm such a claim.

Finally, understanding the Court's decision-making process is important, independent of this debate, as it touches on the fundamental role of the ICC in world politics. Proponents of the Court argue that it is a transformational institution with unprecedented authority to advance international criminal justice because of its independence and impartiality, while critics claim it is an ineffectual pawn of powerful states' interests. Which of these characterizations better reflects the nature of the ICC, however, remains an open question. Ultimately, existing literature provides few insights into OTP decision-making. We are thus unable to answer the most basic question about the functioning of the Court: how does the OTP choose where it will act? It is to this question that we turn in the following sections, theoretically and empirically examining the process by which the OTP selects targets for examinations and investigations.

OTP Prosecutorial Discretion

In creating the ICC, states delegated to the Chief Prosecutor and her office (the OTP) significant authority and autonomy to select situations for examination and investigation (Danner 2003; Schabas 2011; Stahn 2009).[6] The OTP has broad decision-making author-

[6]IOs derive authority and independence through the delegation processes that states engage in when creating them, and through the expertise and specialization that they provide (Barnett and Finnemore

ity at two key stages: the first involves the decision to initiate a preliminary examination, and the second involves the decision to escalate to a formal investigation.[7]

The OTP can initiate preliminary examinations via three mechanisms: (1) referral by a state party, (2) referral by the UN Security Council, or (3) via its own proprio motu (Article 15) authority, which allows it to initiate examinations, independent of referral, based on communications received from states, NGOs, individuals, etc. (Schabas 2011; Smeulers, Weerdesteijn, and Hola 2015). While jurisdiction is limited to crimes committed on the territory of or by nationals of state parties in situations initiated via mechanisms (1) and (3), this is not the case for situations referred through the UNSC. Furthermore, the OTP is not obligated to proceed with a preliminary examination when situations are referred by states or the UNSC; rather, the "Prosecutor maintains the discretion to determine whether it is appropriate to move forward with such a situation" (Smeulers, Weerdesteijn, and Hola 2015, 5; also see: Bosco 2013, 8; Schabas 2011, 380). Proprio motu authority, coupled with final authority on the decision to proceed even in referred cases, suggests that even at the preliminary examination stage, the OTP has considerable discretion and authority to decide whom to target.[8]

2004, 1999; Beardsley and Schmidt 2012; Finnemore 2009; Haftel and Thompson 2006).

[7]The OTP also plays a key role, once engaged in a formal investigation, in the decision to issue arrest warrants or summonses for individual suspects. We do not focus on this decision point here because the unit of analysis changes from the state (or opposition group) as target to specific individuals as targets. However, in a robustness check, we do test whether our key measure affect the decision to progress a formal investigation to targeting specific individuals. We find...

[8]Arguably, there are greater restrictions on OTP discretion and authority with regard to the decision to initiate preliminary examinations versus the decision to advance to formal investigation, particularly because there are fewer mechanisms by which the OTP can gain jurisdiction to initiate a preliminary examination targeting non-ratifiers of the Rome Statute. We account for the possibility that our results are sensitive to the inclusion of non-state parties in a secondary test focused only on ratifiers. MORE

In accordance with Article 53 of the Rome Statute, the OTP assesses jurisdictional issues, admissibility (gravity and complementarity), and whether proceeding with an investigation serves the interests of justice during a preliminary examination (Office of the Prosecutor 2013). If the OTP deems that there is a reasonable basis to proceed, the chief prosecutor can then advance the situation to a formal investigation. During a formal investigation, the OTP gathers evidence, identifies suspects, and requests ICC judges to issue arrest warrants or summonses for suspected perpetrators. As Bosco (2013, 8) notes, prosecutorial discretion is nearly absolute at this decision point: "the prosecutor and the judges have almost complete discretion as to which situations to investigate and which individuals to prosecute."

The Strategic Logic of Situation Selection and Advancement

Given that the OTP has wide prosecutorial discretion at each of these key decision points, it is imperative to understand the chief prosecutor's incentives and constraints in order to build a coherent theory of situation selection. Research on international courts suggests that high levels of delegation and discretion, such as that enjoyed by the OTP, promote judicial independence from political influence, ensuring that decisions made by these institutions are rooted in clear legal principles (Alter 2008; Voeten 2008). However, these existing arguments focus on international court *rulings*, not on the initial decision to investigate, as most other international courts do not have the authority to select situations and cases like the OTP does. Therefore, it remains an open question whether the vast discretion delegated to the OTP prevents or promotes political considerations in situation selection and advancement. While the Chief Prosecutor's decision-making is *legally* autonomous from member states and other international actors, that does not mean she is necessarily indifferent to or unaffected by such actors' preferences and interests.

HERE.

We begin with two key assumptions. First, building upon insights from American politics research on Supreme Court agenda setting and criminal prosecutors, we assume that the OTP behaves strategically when making decisions about whether to initiate preliminary examinations or advance situations to formal investigation.[9] Second, and following from this, we assume that the chief prosecutor has incentives to maximize both impartiality and effectiveness when it comes to situation selection and advancement.[10]

Regarding the former, the chief prosecutor is directly accountable to the President of the ICC as well as the Assembly of State Parties (ASP). The ASP votes the Chief Prosecutor into office, and the ASP or the President can remove her from office or disqualify her from specific cases through a majority vote (Schabas 2011, 379). This accountability incentivizes the chief prosecutor and her office to prioritize impartiality, or strict adherence to the legal standards established in the Rome Statute. Neoliberal accounts of IO behavior suggest that state parties' support for the OTP likely depends upon the extent to which the chief prosecutor adheres to the mission that member states have assigned to her, as legitimacy derives from following the mandate (Barnett and Finnemore 2004; Beardsley and Schmidt 2012; Finnemore 2009).[11] A chief prosecutor who repeatedly acts

[9]Like the OTP, both justices and prosecutors have tremendous autonomy when it comes to case selection, and research recognizes that both behave strategically when it comes to agenda setting. Justices engage in sophisticated voting and are influenced by both legal concerns and policy considerations (Black and Owens 2009; Caldeira, Wright, and Zorn 1999; Perry 1991), while prosecutors are influenced by strategic considerations from a desire to secure reelection to partisan loyalties (Gordon and Huber 2009, 136).

[10]By impartiality, we specifically mean the OTP will fulfill its duties without consideration of political influence. As Schabas (2011, 379) notes, the "prosecutor and deputy prosecutors are all required to make a solemn undertaking in open court to exercise their functions impartially and conscientiously."

[11]Building institutional legitimacy is an important consideration for the OTP, as the court must be perceived as legitimate by members of the international community to maintain its institutional viability. Indeed, "organizational survival and acceptance are dependent on demonstrating legitimacy" (Barnett

in ways deemed out of step with the legal standards established in the Rome Statute thus faces possible removal by the ICC President or Assembly of State Parties, as the OTP's legitimacy would be compromised. This is likely why the OTP has made significant efforts to clarify and justify its situation and case selection policies by publishing detailed reports and policy papers on selection (Office of the Prosecutor 2013, 2016).

At the same time, the OTP also has incentives to maximize effectiveness by selecting situations that it believes have a high probability of advancing quickly and resulting in successful prosecutions. This incentive also derives from the chief prosecutor's accountability to the ASP and president. As Schabas notes (2008), the slow pace of investigations and prosecutions by the OTP has created tension between the OTP and other organs of the court, including the ASP. "The ICC has faced regular criticism that it sucks in investment with few results to show for it. Indeed, this is a common refrain at the regular annual meeting in The Hague of the Assembly of States Parties which funds the court" (Silverman 2012).[12] Thus, the OTP faces pressure to advance situations through the various stages quickly and effectively, incentivizing the OTP to strategically select situations with an eye toward anticipated effectiveness.

The OTP's incentives to select and advance situations with impartiality and effectiveness in mind suggest two possible strategic logics of situation selection. The first suggests that the OTP will select the gravest cases that domestic courts cannot or will not take on, as gravity and complementarity are the key Rome Statute principles guiding situation selection. The second suggests that the OTP will select situations that it believes will gain the backing of powerful states, as strong state support is key to the OTP's ability to

and Finnemore 2004, 43).

[12]Further, the OTP risks legitimacy costs if it cannot demonstrate its effectiveness. As Barnett and Finnemore (2004, 168) argue, "IOs are often judged by what they accomplish, and . . . lack of effectiveness injures their legitimacy".

function effectively.[13]

Importantly, these two selection strategies are neither mutually exclusive, nor always fully compatible with one another. The OTP, therefore, faces a tradeoff; pursuing cases in line with powerful states' interests may improve the OTP's effectiveness by making it more likely that the court gains the backing of key international actors to support its investigations and prosecutions, but doing so may also undermine the OTP's legitimacy by deepening the belief that the OTP lacks impartiality and is a pawn of powerful states. On the other hand, selecting situations based upon issues of gravity and complementarity may improve legitimacy, and thus the support the OTP receives from member states and the ICC presidency, but may undermine the prosecutor's ability to effectively carry out examinations and investigations if the gravest cases are threatening to powerful states' interests and thus are not supported by key international actors. In the following sections, we discuss each of these selection strategies in more detail.

Situation Selection based on Impartiality

As noted above, the OTP has strategic incentives to select situations based upon a principle of impartiality, or strict adherence to the legal mandate established in the Rome Statute. Specifically, the OTP's admissibility assessment is governed by Article 17 of the Rome Statute, which established two key criteria to guide situation selection and advancement: gravity and complementarity.

First, the Rome Statute tasks the OTP with investigating and prosecuting individuals who have committed the "most serious crimes of concern to the international community as a whole" (Rome Statue 5(1)). That is, the chief prosecutor is expected to focus its

[13]State support is critical because the OTP requires the cooperation of governments and other actors to properly investigate potential perpetrators. For example, without the assistance of member states, the OTP cannot arrest suspects, as has been demonstrated by South Africa and Jordan, both member states, failing to arrest Omar Al-Bashir on recent visits to those countries (White 2018).

attentions on the world's gravest crimes. This criterion is written into Article 17(1)(d) of the Statute on admissibility, and allows the Court to declare a case inadmissible "when it is not of sufficient gravity to justify further action by the Court" (Schabas 2011, 200). While the Statute is silent on exactly how gravity should be assessed, OTP policy papers indicate that this principle has been interpreted by examining both the nature and scale of the crimes involved (Smeulers, Weerdesteijn, and Hola 2015).

Thus, if the chief prosecutor is driven primarily by strategic incentives to strictly adhere to her office's legal mandate, the OTP should focus on situations characterized by, and actors responsible for, the gravest human rights violations. It is important to note that the OTP formally assesses admissibility as part of a preliminary examination, when deciding whether to advance to a formal investigation. This suggests gravity should certainly matter in the second stage, as the OTP assesses whether to escalate its involvement. At the same time, the OTP is likely to have already informally assessed the gravity of a given situation *before* initiating a preliminary examination. States, the UNSC, NGOs, and other actors often provide information to the court about gravity when they submit their referral to the OTP. For example, the UNSC claimed that crimes against humanity had taken place against the civilian population in Libya in UNSCR 1970.[14] Furthermore, the OTP monitors potentially violent situations around the world as they unfold, before a preliminary examination is initiated. For example, the OTP issued statements in May and November 2015 regarding the escalating tension and electoral violence in Burundi (Bensouda 2015). These statements were issued the year *before* the preliminary examination in Burundi began, indicating that the OTP was actively assessing gravity prior to the initial decision to get involved.

Thus, we expect that the OTP will engage in an informal assessment of gravity be-

[14]http://unscr.com/en/resolutions/doc/1970 need to cite.

fore initiating a preliminary examination, and will then carry out a more formal gravity assessment before advancing to a formal investigation. As a result, if the OTP prioritizes adherence to its legal mandate, the gravity of abuses perpetrated by a government or non-state actor will be a strong, positive predictor of advancement at both key decision points.

Furthermore, if the OTP prioritizes impartiality, its involvement should be directed specifically at the actor or actors responsible for human rights abuses, without consideration of the political ramifications of such targeting. That is, the OTP will initiate examinations and advance formal investigations against *the government* when it has perpetrated grave abuses of human rights, and will initiate and escalate investigations against *non-state actors (e.g. rebels or members of the opposition)* when such non-state actors are responsible for grave human rights violations. In other words, an OTP that acts primarily with impartiality in mind will not be swayed by the power of state agents to avoid investigation or political considerations regarding which actors have powerful international allies, but will instead initiate examinations and investigations that impartially target the actor or actors most responsible for grave human rights violations.

Hypothesis 1a: As the gravity of human rights violations perpetrated by the government increases, the likelihood that the OTP initiates a preliminary examination and advances to a formal investigation targeting the government increases.

Hypothesis 1b: As the gravity of human rights violations perpetrated by opposition actors increases, the likelihood that the OTP initiates a preliminary examination and advances to a formal investigation targeting opposition actors increases.

The second aspect of the legal mandate that should influence OTP situation selection if the chief prosecutor follows a logic of impartiality centers on the Rome Statute's other key admissibility principle, complementarity. The ICC was conceived of as a 'court of last resort', meaning its jurisdiction extends only to situations in which domestic legal systems

are unwilling or unable to effectively investigate or prosecute suspected violators of the law. That is, "The Court is intended to complement, not to replace, national systems. It can only prosecute if national systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to carry out such proceedings genuinely" (Bensouda 2012). Article 17 of the Rome Statute mandates that the OTP assess complementarity when determining whether it has jurisdiction over particular situations, and that the OTP move forward only when domestic courts do not (Schabas 2011).

Thus, if the OTP is driven primarily by strategic incentives to adhere to its legal mandate, it should evaluate the likelihood of effective, unbiased domestic prosecution before acting itself. The likelihood of unbiased domestic prosecution, we argue, is a function of the effectiveness or independence of the state's judicial system (Conrad and Ritter 2013; Conrad 2014; Conrad and Moore 2010; Powell and Staton 2009). States with independent judicial institutions can more easily investigate and try perpetrators of human rights violations, even if those perpetrators are high-ranking government officials, while in states without judicial independence, perpetrators can commit violations with domestic impunity.[15]

As with gravity, assessing the presence and quality of domestic prosecutions is officially undertaken as part of an ongoing preliminary examination's phase 3 admissibility assessment. However, like gravity, we expect the OTP to have some baseline expectation about the likelihood of unbiased domestic prosecution before initiating a preliminary examination. This is because judicial independence is likely observable to the OTP before it decides whether to initiate a preliminary examination. It is also likely that actors who

[15]Of course, judicial independence is an imperfect proxy for domestic prosecution. Some states with strong and independent legal institutions may still fail to pursue justice against potential perpetrators. Nonetheless, we expect that, on average, perpetrators are more likely to be held accountable when states have effective domestic judiciaries.

refer situations to the court via official communications or referrals provide information to the OTP regarding the presence or absence of domestic accountability processes surrounding reported abuses. For example, when the Comoros government referred Israel to the OTP, their referral explicitly addressed complementarity, arguing that Israel was unlikely to prosecute those responsible for the raid on the Flotilla due to lack of political will and the failure to try high-level military officials in the past.[16] Similarly, in Amnesty International's communications to the ICC over the situation in the Philippines, the NGO explicitly discussed the lack of domestic accountability ("The Philippines: ICC Examination into Drug Killings a Crucial Moment for Justice" 2018). Therefore, it is likely that judicial independence affects not only the decision to initiate a preliminary examination, but also the decision to advance to a formal investigation.[17]

Hypothesis 2: The OTP is less likely to initiate preliminary examinations or to advance situations to formal investigation when the relevant state has a more effective/independent judiciary.

Situation Selection Based on Effectiveness

The OTP also faces strategic incentives to select situations based upon a need to demonstrate effectiveness in the execution of its mandate. As noted above, an OTP that continually fails to accomplish its objectives will be perceived by member states as ineffective and will, as a result, suffer legitimacy costs that might ultimately threaten the chief prosecutor's position and the OTP's (and ICC's) viability more generally.[18] This is why challenges to the court on effectiveness grounds are so threatening, and why the

[16]https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf .

[17]We expect judicial independence to decrease the likelihood of ICC involvement targeting both state and opposition actors.

[18]Research on institutional legitimacy suggests that an IO's perceived legitimacy is affected by what it accomplishes, or its effectiveness (Barnett and Finnemore 2004; Suchman 1995, 580).

OTP is incentivized to prioritize effectiveness as a key selection criterion.

While there are likely several factors that influence the OTP's ability to effectively investigate and prosecute, central among them is whether the OTP receives major power cooperation, particularly the support of the permanent five members of the UN Security Council (i.e. P5 states), as these states have the economic, political, and military might to advance or undermine the OTP.[19] The backing of these states is important from an effectiveness standpoint because the OTP's institutional capacity, as established in the Rome Statute, is limited in several ways.

Most importantly, the OTP lacks enforcement capabilities. It has no standing army or police force and cannot execute its own warrants, and therefore relies upon the cooperation of states for enforcement (Goldsmith and Krasner 2003; Prorok 2017). The inability to enforce warrants/summonses on its own is a crucial limitation for at least two reasons. First, governments may lack the willingness or capability to capture and transfer wanted individuals themselves.[20] Uganda, for instance, has been unable to capture wanted LRA leader Joseph Kony, and Ugandan president Museveni has requested the assistance of the United States to track him down. A government may also lack the willingness to turn over suspects, even if it has the capacity to do so. For example, the Ivory Coast government has refused to turn over Simone Gbago, wife of former President Laruent Gbago, to the ICC.[21] Given that involved governments may often be unable or unwilling to enforce ICC warrants, pressure from powerful states can play a crucial role in achieving compliance,

[19] An important determinant of IO effectiveness is whether the institution receives financial and political support from powerful states (Barnett and Finnemore 2004, 168). Although there are several strong states in the system, we expect P5 states to carry the most weight with the OTP, for reasons discussed below. We therefore focus our discussion on these states.

[20] While some indicted individuals voluntarily turn themselves in, many suspects remain at large and must be arrested by states and transferred to the Court to face trial.

[21] http://www.bbc.com/news/world-africa-24179992

either by aiding the unable or coercing the unwilling.

Further, the OTP relies upon the cooperation and support of powerful states to carry out investigations. In the preliminary examination stage, the OTP spends a considerable amount of time in a state to determine if it should move to a formal investigation. Once a formal investigation is underway, the OTP must collect the necessary evidence to prosecute potential perpetrators. In the Democratic Republic of Congo, for instance, the OTP conducted more than 70 missions inside and outside of the DRC, while in Uganda it completed nearly 50 missions in a 10 month period (Human Rights Watch 2008). During its visits to Uganda, the OTP relied on the Ugandan Armed Forces as escorts to travel throughout the country due the instability there (Human Rights Watch 2008). Powerful states' support may be necessary in many cases to persuade reluctant governments to cooperate with OTP investigators, or to financially support these fact-finding missions. Lacking powerful states' support, therefore, the Court could not operate effectively.

How do these constraints affect the OTP's decision-making? If the OTP prioritizes effectiveness, we should observe it selecting situations for examination and investigation that align with P5 states' interests, or that at least do not threaten P5 states' interests. Specifically, when one or more P5 states have strong ties to a government or non-state actor who is a potential OTP target, the Chief Prosecutor will be deterred from initiating an examination or investigation out of fear of alienating the relevant P5 state(s) and thus having its activities thwarted. That is, in order to maximize effectiveness, the OTP will avoid actions that might undermine the backing of any of the P5 states.[22]

The support, or at least acquiescence, of the P5 is key to the OTP, despite the fact

[22]The five P5 states have diverse interests and allies around the world. Our expectation is that strong opposition from any one of the P5 is enough to undermine the OTP's effectiveness. Therefore, the OTP is likely to consider the potential support of P5 states *independently,* and to be deterred when at least one P5 state's interests are threatened.

that three of the P5 – the United States, Russia, and China – are not state parties to the Rome Statute. First, P5 state support is critical because these are the states with the power, resources, and international reach to act as the ICC's enforcers or, alternatively, to directly undermine the Court's effectiveness. The United States, for example, despite its refusal to ratify the Rome Statute, has turned over suspects to the Court. In April 2013, US officials transferred fugitive warlord Bosco Ntaganda to the Hague after he turned himself in to a US Embassy in Rwanda (Simons 2013). Similarly, as noted above, the US has worked with Uganda to capture LRA leader Joseph Kony. Second, because the Rome Statute gives the P5 the authority to refer cases to the ICC, the P5 constitute an important audience for the Court. The P5 came together in 2011 to refer the situation in Libya to the Court, demonstrating implicit support for the institution and bolstering its legitimacy. Russia and China, on the other hand, vetoed a UNSC resolution in May 2014 that would have referred the situation in Syria to the Court ("Syria War Crimes Move Blocked at UN" 2014).

Finally, the P5 are states with the coercive capacity to indirectly support or undermine the court. That is, they have a variety of carrots and sticks at their disposal that they can use to persuade third party states and other non-state actors to either support or undermine the ICC. The American Rewards for Justice Program, for example, bolsters the Court indirectly. While US law prohibits direct payments to the Court, this program supports the Court's activities by providing payments of up to five million dollars to third parties for information that leads to the apprehension of fugitives in atrocities cases (Simons 2013). Likewise, several European states issued travel bans against indicted Kenyan leaders William Ruto and Uhuru Kenyatta, while President Obama refused to visit Kenya during his 2013 trip to Africa due to the ICC's indictments there.[23] P5

[23]http://www.the-star.co.ke/news/article-99118/uhuru-ruto-banned-visiting-europe

actions are not always benevolent, however; reports indicate that Western diplomats exerted significant pressure on the Court not to open a Gaza war crimes inquiry (Borger 2014; "Report: US Exerting Pressure on ICC Not to Open War Crimes Probe against Israel" 2014).

This suggests that the interests of P5 states are likely to affect the OTP's decision-making. That is, the goal of pursuing justice in the worst situations where it cannot be served domestically may be undermined by the constraints the Court faces due to its reliance upon strong state support and the need to demonstrate effectiveness. As a result, the OTP is likely to pursue cases when it anticipates the support of P5 states, whereas it may shy away from intervening in situations that threaten the interests of at least one of the P5, for fear of losing their much needed cooperation. This suggests that the OTP's situation selection and advancement decisions are inherently affected by political considerations: the OTP will consider the strength of P5 states' ties to governments and non-state actors in potential target countries when selecting situations. It will be more inclined to target government officials and non-state actors that lack strong ties to P5 states, while it will be less likely to intervene against governments and non-state actors with stronger ties to at least one P5 state.

Hypothesis 3a: As the strength of P5 ties to a given government increases, the likelihood that the OTP initiates a preliminary examination and advances to a formal investigation *targeting that government* decreases.

Hypothesis 3b: As the strength of P5 ties to opposition/non-state actors within a given state increases, the likelihood that the OTP initiates a preliminary examination and advances to a formal investigation *targeting opposition or rebel actors* in that state decreases.

Research Design

The empirical analysis presented below uses the country month as the unit of analysis, covering state months from July 2002 (when the ICC became active) through December 2015. There are a total of 31,175 country months in our dataset.[24] While we would prefer to limit our sample to cases with some minimal expectation of ICC involvement, identifying that set of 'at-risk' cases is nontrivial. One possibility would be to establish as the relevant population of cases only those situations that have been referred to the Court by communications from states, international organizations, and non-governmental organizations. The Court, however, has not made details on communications received publicly available, and numerous attempts to obtain this information have gone unanswered. Another possibility would be to restrict the sample of potential cases to countries with high levels of one-sided violence, human rights violations, etc. However, these factors that likely influence the expectation of ICC involvement are included in our models as independent variables, precluding us from using them to select our cases. We therefore use all country-months as our sample for analysis. This allows us to investigate potential ICC involvement in all states since 2002 without relying on potential explanatory variables to select a relevant set of observations.[25]

Response Variables

The empirical analysis below tests the determinants of ICC involvement onset and escalation, while also accounting for the target of the ICC's involvement. Specifically, we

[24]The actual number of observations in the empirical analysis is smaller due to missing data on some variables.

[25]As a robustness check, we do limit our sample when predicting the *onset* of ICC involvement to a restricted set of cases that (1) have experienced a political terror (PTS) score of 3 or higher or (2) have experienced civil conflict at some time since 2002. Restricting the sample in this way does not significantly change our empirical results.

examine four dependent variables: (1) *State-Focused ICC Onset*, (2) *Opposition-Focused ICC Onset*, (3) *State-Focused ICC Escalation*, and (4) *Opposition-Focused ICC Escalation*. To measure each of these variables, we first need to determine what constitutes involvement in a particular country by the ICC. To do this, we first identify whether the behavior of, or actions taken by, officials or nationals of a particular country is explicitly being examined or investigated by the ICC. Evidence of this includes explicit references to the behavior of or crimes potentially committed by nationals of that country in ICC reports and documentation. We examined a variety of documents from the ICC, including press releases on the opening of examinations/investigations, yearly reports on the Court's activities, summary reports for ongoing cases, etc. Importantly, this coding rule means that the state associated with a particular "situation" is not necessarily the state, or the only state, experiencing ICC involvement. For example, the situation referred to the ICC by Comoros, Greece, and Cambodia does not involve an investigation of actions taken by these states or their nationals, but instead is focused on potential abuses committed by Israel. We therefore treat Israel as the target of ICC involvement, while excluding Comoros, Greece, and Cambodia as ICC targets. Additionally, in the court's preliminary examination focused on Afghanistan, both Afghanistan and the United States are implicated. This is because reports provided by the ICC on it's preliminary examination activities explicitly refer to potential abuses perpetrated by Afghan forces and nationals, as well as to potential abuses committed by US forces in Afghanistan. Thus, ICC involvement is coded for both Afghanistan and the United States.

After identifying which states have experienced ICC involvement, we code two variables to capture the onset of ICC involvement. *State-Focused ICC Onset* is a dummy variable coded 1 in the month the ICC begins a preliminary examination in which the government is targeted. We consider the ICC's actions to be government-targeting if they involve examining/investigating actions taken by current members of the state's security

forces or current political leaders. We also consider actions to be state-targeting if the Court investigates alleged crimes committed by supporters of or groups supported by the current regime.[26] This variable is coded 0 in all other months, and importantly, observations with ongoing ICC involvement remain in the dataset, as it is possible for the ICC to begin a new examination even if the first one is still ongoing (e.g. Central African Republic). This variable is coded 1 in 19 of 31,175 observations (.06%). *Opposition-Focused ICC Onset* is a dummy variable coded 1 in the month the ICC begins a preliminary examination targeting opponents of the state in question. Opponents include current rebels, political opponents, and any others who are not considered state targets. This variable is coded 0 in all other months, and as with the state-based onset variable, is also coded 0 during ongoing investigation months. This variable is coded 1 in 15 of 31,175 observations (.05%).[27]

The third and fourth dependent variables, *State- and Opposition-Focused ICC Escalation*, measure the level of ICC involvement in a given month on a scale from 1 to 6. For these variables, we code the highest level of ICC involvement reached in any given month that is focused on a current member or supporter of the government (state-focused) or opposition (opposition-focused).

The levels of ICC involvement are as follows: a 1 is coded if the highest level of ICC involvement in the current month is a preliminary examination. This includes referrals from states parties or the UN Security Council that have not yet progressed to a formal investigation. A 2 is coded for country months in which a formal investigation is ongoing,

[26]For example, this includes crimes allegedly committed on behalf of Kenyan government officials by private citizens (i.e. lawyers engaging in witness tampering on their behalf). This would also include crimes allegedly committed by pro-government militia groups that receive state backing.

[27]In several cases, both state and opposition figures are implicated in the ICC's actions. In these cases, both onset variables are coded 1.

but which have not progressed to the issuing of warrants or beyond. A 3 is coded for country months in which the highest level of ICC activity is an outstanding warrant or summons (i.e. that warrant/summons has not been executed). A 4 is coded for country months in which the highest level of ICC activity involves a suspect being in custody at the Hague and/or hearings ongoing to determine whether or not to confirm charges against a suspect. A 5 is coded once charges have been confirmed against a suspect, but before a trial begins, and a 6 is coded if a trial is ongoing.[28]

It is also important to note that these variables are coded based upon the status of those being investigated in any given month. This means that the highest level of state or opposition-focused ICC involvement may change if those under investigation switch sides. This can occur, for example, if a regime change occurs in which targeted government officials lose power or targeted opposition members come to power.

Two brief examples will help elucidate the coding of these variables. First, the ICC initiated a preliminary examination into the situation in Colombia in 2004. The Court's examination explicitly focuses on actions taken both by rebel organizations opposed to the state (i.e. FARC and ELN) and pro-government paramilitaries and the state's own security forces. The ICC's examination, furthermore, has not proceeded to the formal investigation stage. Therefore, *State-Focused ICC Escalation* is coded 1 from June 2004 through December 2015, as there is an ongoing preliminary examination during this time that potentially implicates state officials. *Rebel-Focused ICC Escalation* is also coded 1 from June 2004 through December 2015, due to the ongoing preliminary examination that implicates members of opposition groups.

Second, the ICC has been involved in the situation in Libya since February 2011, when it was referred to the OTP by the UNSC. By March, the ICC's involvement progressed to

[28]Ongoing trial involves everything from the opening of the trial through the sentencing phase.

a formal investigation, and by June 2011, warrants were issued. Those warrants remain outstanding today. At the beginning of the ICC's involvement, the Court's efforts were focused on current state officials -- Gaddafi and members of his inner circle – and therefore the ICC's involvement is coded as State-focused. This changed, however, in September 2011, when the Gaddafi regime fell and former regime opponents took power. As a result, our coding changes in September 2011, such that Opposition-Focused ICC Involvement is coded 3 from that month on.

Based upon the above coding rules, State-Focused ICC Escalation has the following distribution: 1) 843 observations 2) 49 observations 3) 116 observations 4) 16 observations 5) 34 observations and 6) 66 observations. Rebel-Focused ICC Escalation is distributed as follows: 1) 644 observations 2) 124 observations 3) 189 observations 4) 74 observations 5) 130 observations and 6) 130 observations. Observations are excluded from the escalation equations if they do not have some ongoing ICC involvement.

Legal Mandate Variables

The legal mandate argument suggests that the OTP will base its case selection on the gravity of abuses committed. To test this expectation, we include variables that account for violations of international humanitarian law. First, civilian targeting provides a useful metric for identifying human rights abuses committed by state and opposition officials because the extrajudicial killing of noncombatants is expressly prohibited by international humanitarian law (Blank and Noone 2013).

We use the Uppsala Conflict Data Program's (UCDP) Georeferenced Event Dataset (GED) version 5.0 to identify the number of civilians killed by government and opposition groups in any given month (Melander and Sundberg 2013). The GED is an events dataset that includes information on all instances of civilian targeting, or One Sided Violence (OSV), perpetrated by governments and nongovernmental actors between 1989 and 2015. These data have several advantages over other measures of human rights violations.

First, they are available through 2015, whereas many other existing datasets that capture human rights practices end earlier, which would force us to shorten our analysis timeframe and ignore important cases of ICC involvement. Second, these data allow us to identify the perpetrators of human rights violations. Other possible datasets such as PTS and CIRI provide only a single country-level 'score', which identifies the level of human rights violations in a given country. They do not allow us to identify violations perpetrated by non-state actors, as the scores generally refer to state-based abuses. This is critically important, given that ICC action is often directed at specific non-state or opposition actors within the state, not at the state itself. Measuring violations of human rights perpetrated only by the state, therefore, is insufficient as a predictor of directed ICC involvement. Finally, the OSV data provided by GED provides several advantages over other measures because it is events-level data. It can therefore be easily aggregated to the monthly level to generate a measure of the magnitude of OSV perpetrated by government or non-state actors in a given month. Other Human Rights datasets, which provide a yearly summary measure of human rights violations, provide less variation and are not as compatible with our monthly data on ICC involvement.

To measure government OSV, we first generate the sum of all civilians killed in one-sided violence events perpetrated by each government in a particular month based upon the raw events data from GED.[29] We then create two separate measures for the onset and

[29]The GED does not include data for Syria, but otherwise has global coverage. We therefore include data from UCDP's One-Sided Violence dataset (Eck and Hultman 2007) for Syria. These data are yearly rather than monthly, so we divide the number of deaths committed in a given year evenly across the months of that year. While this is an imperfect solution, it does allow us to include Syria, a potentially important case, in our analysis. It is also better than using some other data sources that have more micro-level civilian deaths data, as the definition of OSV is not the same across other data sources, whereas the two UCDP dataset use the same definition of civilian targeting. Finally, it is important to

escalation analyses. First, to understand the impact of government-perpetrated OSV on the risk of state-focused ICC onset, we generate a running sum of the number of civilians killed in government-perpetrated OSV since July 2002, through the current month. This running sum provides a measure of the magnitude of human rights violations perpetrated by the state since the ICC became active. It is important to use this running sum rather than a simple measure of deaths in a given month because the Court can decide to investigate instances of war crimes or crimes against humanity that occurred any time since a state came under its jurisdiction or since the court became active (if referred by the UNSC or the state itself).[30] In our model predicting State-Focused ICC Onset, we therefore include the natural log of the running sum of state-perpetrated OSV since July 2002. This variable ranges from 0 to 8.7, with an average of 3.8.

In our model predicting State-Focused ICC Escalation, we measure the level of government-perpetrated OSV that occurred during the period under examination/investigation. For each preliminary examination and investigation, the ICC reports, often with great specificity, a particular date range that constitutes the focus of its inquiry. For example, The ICC's investigation of the situation in Georgia explicitly focuses on the events of July 1 through October 10, 2008. Some investigations are more open-ended; for example, the investigation in Uganda focuses on events since July 1, 2002, inclusive of today. This variable, therefore, identifies the period under investigation and then sums the total government-perpetrated OSV committed during that period. If the period of investigation

note that our results remain consistent if we exclude Syria from the analysis.

[30] An alternative would be to create a running sum of OSV perpetrated since the state became a ratifier of the Rome Statute. However, this would not allow us to include states that have not ratified the Rome Statute, and would ignore the fact that states can come under investigation by the ICC for crimes committed despite non-ratification if they are referred by the UNSC or a non-state party who accepts the Court's jurisdiction on an ad hoc basis.

is ongoing (e.g. Uganda) in the current month, this variable equals the running sum since the start of the period under investigation, through the current month. This variable is logged to account for its skewed distribution. The variable ranges from 0 to 8.6 with an average of 3.6.

In our models predicting Opposition-Focused ICC Onset and Escalation, we create variables analogous to those created for the state. We start by identifying all OSV perpetrated by non-state actors on the territory of a given state in a given month. We then sum those deaths to create a monthly total number of civilians killed by non-state actors in a given state in a given month. In the onset equation, we include the natural log of the running sum of opposition-perpetrated OSV since July 2002. This variable ranges from 0 to 9.3 with an average of 4.9. In the escalation equation, we include the total non-state perpetrated OSV committed during the period under investigation, or, if the period of investigation is ongoing, from the start of the period of investigation through the current month. This variable ranges from 0 to 9.1 with an average of 4.4.

Finally, we include a measure of judicial independence from Powell and Staton (2009). This variable is a composite measure that incorporates information from seven different measures of judicial independence, and varies between 0 and 1, where higher values indicate greater independence of a state's judiciary. This corresponds well with the principle of complementarity, as it proxies the willingness and ability of the judiciary to investigate alleged perpetrators of war crimes and crimes against humanity. States with strong, independent judiciaries have the capacity to investigate perpetrators, while those with weak, non-independent judiciaries cannot credibly threaten an independent, effective investigation. This holds for investigations that target both the state and opposition: a non-independent judiciary will be unable to hold state officials accountable because the judiciary is dependent upon those state officials. A weak judiciary, furthermore, will likely be unable to carry out an effective, unbiased investigation of opposition perpetrators.

States with strong judiciaries, therefore, make both state-focused and opposition-focused ICC involvement unnecessary. As discussed above, this effect should be particularly pronounced in the analysis of ICC escalation, as preliminary examinations may take place in states with strong judiciaries, but those examinations are unlikely to progress. In the sample, judicial independence ranges from .02 to .99 with a mean of .54.

Realist/Institutional Constraints Variables

As argued above, it is likely that the Court considers the reactions of third party states, especially the P5, when it becomes involved in a situation. The implication is that the ICC might be more reluctant to target states that have strong ties with the P5. Based on this logic, we include several variables in our empirical analysis to account for a state's relationship with the P5.

First, we include measures of military closeness to the P5. We create two dummy variables to identify ongoing military intervention by a P5 state into a given country. We collected original data on P5 interventions, as existing datasets either were unavailable for the time period covered in our investigation, or restricted their coverage to large interventions or only those during events such as civil wars (Koch and Sullivan 2010; Pickering and Kisangani 2009). To collect this information, we had coders search Lexis Nexis for news articles about military actions taken by each of the P5 states between 2002 and 2015. Excluded from this measure are military deployments that were humanitarian in nature, peacekeeping, or interventions intended to simply remove nationals of a P5 state from a risky situation. The variables we use in the analysis identify whether there is an ongoing military intervention by any P5 state in a given country-month. We also identify whether that intervention is pro-government or pro-opposition, which generates two dummy variables. The first, *Pro-State Intervention* is coded one if there is an ongoing P5 military presence supporting the government in a given country-month. The second, *Pro-Opposition Intervention,* is coded 1 if there is an ongoing P5 military presence supporting

opponents of the current government in a given country-month. Pro-State Intervention is coded 1 in 974 of 31,175 observations, while Pro-Opposition Intervention is coded 1 in 695 of 31,175 observations.

We also include a measure of alliance commitments between the state in question and the P5. This variable, which is coded 1 if the state in question has a defensive pact with any P5 member in the current year, is used as a second measure to capture the military closeness of a given state to any P5 member. We focus on defensive alliances because these represent the highest level of military commitment, suggesting that the state is important to the P5 state. The advantage of this variable is that while a military intervention may be better at capturing the immediate links between the state and a P5 member, there may be no need for military intervention in a given month. Alliance commitments, which are more long-term, should pick up on the underlying military closeness of the state with the P5 in situations where there is no active military intervention. We use the Correlates of War data on military alliances to code this variable (Gibler 2009).[31] It is coded 1 in 10,296 observations. It is lagged 1 year in the analysis.

As another measure of P5 closeness that moves beyond military relationships, we include a measure of the minimum ideal point distance from the given state to the closest P5 state. This measure is lagged 1 year. The ideal point data come from Bailey et al. (Forthcoming). Our expectation is that as this minimum distance increases, the state in question gets farther and farther from the P5 in terms of policy similarity. This suggests that the P5 have less of a vested interest in the government of that state, and ICC involvement should be more likely, as it will not threaten strong P5 interests. We expect this variable to have the opposite effect on ICC involvement focused on the opposition:

[31] We are unable to use the Alliance Treaty Obligations and Provisions (ATOP) data because it ends in 2003.

as ideal point distance to the closest P5 member increases, the P5 are more likely to have close ties with opposition groups in these dissimilar states, and will therefore have incentives to pressure the Court not to get involved in an opposition-focused examination or investigation. In the sample, the ideal point data ranges from 0 to 1.4 with a mean of .32

Control Variables

We also include several control variables to account for alternative explanations of ICC involvement. First, we include a binary variable to account for whether the state is in Africa. This variable equals 1 if the country is on the African continent, and zero otherwise. As we suggest throughout this paper, many commentators argue that the ICC has an Africa bias, as it has only initiated formal investigations in African nations. We thus expect that the ICC will become more involved in situations in Africa. Second, we include a control for whether the state in question ratified the Rome Statute. Ratifying the Rome Statute is important because it gives the ICC jurisdiction over the state in question.[32] The variable is binary; it equals 1 if the state ratified the Rome Statute and zero otherwise. Data were obtained from the ICC website.[33] We also include a measure of regime-type. This variable equals 1 if the state receives a 6 or greater on the net polity scale and zero otherwise (Marshall and Jaggers 2010). [34] We expect the ICC to be less likely to become involved in situations in wealthier and more democratic states, as these states likely have the resources and willingness to address human rights violations domestically. Finally, we include a dummy variable to account for whether there is an

[32]Ratification is not a prerequisite for ICC involvement, however, as the Security Council can refer situations in non-state parties (e.g. Sudan), and states can accept the Court's jurisdiction on a more limited basis (i.e. relating to a specific situation) without ratifying the Rome Statute.

[33]http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx

[34]The results are the same whether 6 or 7 is used as the cut-point for democracy.

ongoing civil conflicts in the state using the UCDP Armed Conflict Data (Themnér and Wallensteen 2012). We expect the ICC to be more likely to become involved if a civil war is ongoing. While the ICC is not responsible for prosecuting conflict per say, it is likely that the prevalence of conflict is correlated with war crimes. This variable is lagged one year.

Empirical Results

Onset Models

In Table 1, we present the results for the preliminary examination models. We use probit with robust standard errors to estimate this model. We first discuss the results for the onset of ICC involvement directed against governments. Perhaps most significantly, we find no statistical support for the impact of Africa on the onset of such examinations. This result is important given conventional wisdom, which suggests that the ICC and OTP are biased against African states and groups. The underlying data support this finding; the ICC has initiated 19 investigations against governments or governments and subnational actors, but only 5 involve African states. Thus, both the statistical results and basic trends in the data do not indicate that the ICC has an African bias, at least in this initial stage of ICC involvement.

We find mixed support for the legal mandate variables. As expected, we see that the government OSV variable is positive and statistically significant. In line with our argument on the ICC's mandate, this suggests that the OTP is more likely to start a preliminary examination against governments that have intentionally killed more civilians since 2002. In contrast, we fail to find support for the rule of law variable. This results is largely as expected; as discussed in the theory section above, a strong, independent judiciary may only prevent the escalation of ICC involvement to the formal investigation stage. We discuss this result in greater detail below, where tests allow us to more directly

examine the effect of an independent judiciary on the specific decision to initiate a formal investigation. Thus, the results provide some support for the legal mandate argument.

We find little support for the measures that proxy the institutional constraints logic, including the P5 intervention variables, P5 alliance variable, and P5 affinity measure. The results appear to suggest that the OTP's decision to start a preliminary examination is not based on factors associated with P5 interests. Nonetheless, it is important to interpret the results with some caution for at least two reasons. First, the small number of cases (i.e. 19 preliminary examinations) makes it difficult to find statistical significance for the key variables. Second, we are unable to include any economic factors, such as trade and foreign aid due to data limitations. There is no data on economic factors that goes to 2015, the last year in our data set. We therefore cannot make any strong claims about the relationship between P5 economic interests and the probability of preliminary examinations.[35]

Finally we observe mixed results for the control variables. The civil war variable is positive and significant, suggesting that the OTP is more likely to start preliminary examinations in the context of civil wars. We also see that the democracy variable is positive which indicates that the OTP is more likely to initiate preliminary examinations against democratic governments compared to nondemocratic ones. The ICC ratification variable is positive as expected but it fails to reach standard levels of significance.

We also see mixed results in the model predicting opposition-focused ICC onset. While the Africa variable is positive as expected, it fails to reach standard levels of significance. The underlying data once again reinforces the statistical finding. Among the 15 cases of

[35]In preliminary analyses, we find that higher levels of foreign aid are associated with a lower probability of ICC preliminary examinations. We plan to pursue this finding in greater detail in the next iteration of the paper.

opposition-based preliminary examinations, only 7 of them involve groups from African states. Consistent with the results from the government model, this finding challenges the conventional wisdom that the ICC has an African bias when it comes to initiating preliminary examinations.

We see strong results for the legal mandate variables. The opposition one-sided violence variable is positive and statistically significant which suggests that the OTP is more likely to start preliminary examinations against opposition groups when they kill more civilians. We also see that the rule of law measure is negative and statistically significant. Consistent with our expectations, this indicates that the OTP is unlikely to start preliminary examinations against opposition groups when the state in question has a strong, independent legal system.

We, however, see little consistent support for the strategic variables. The P5 intervention variables, P5 affinity scores, and P5 alliance variables all fail to reach significance in this model. Consistent with the government models, this suggests that P5 interests fail to explain the OTP's decision-making in the preliminary examination stage. As suggested above, however, it is important to interpret these results with some caution given the small number of cases. Finally, we again observe mixed support for the control variables. The democracy variable is positive and significant, while the other controls fail to reach standard levels of significance.

Escalation Model

In Table 2, we present the results for the escalation models. We first discuss the findings for the government model. Overall, we find very strong and consistent results in this model. First, consistent with prevailing thought, the Africa variable is positive and significant, which suggests that the ICC is more likely to escalate its involvement against African states than governments from other states.

In addition, we see strong support for the legal mandate variables, as both the rule of law and government one-sided violence variables are statistically significant and in the expected direction. The result for the rule of law variable is important, because it suggests that complementarity is an important predictor of greater ICC involvement. As expected, the Court appears to be using the preliminary examination stage to determine if it has jurisdiction in a situation, including whether the state in question has the willingness and capability to investigate perpetrators on its own.

In contrast to the preliminary examination stage, we observe strong results for the realist variables here. The pro-government interventions variable is negative as expected, while the pro-opposition interventions measure is positive. Consistent with our argument, the P5 UNGA affinity variable is positive, and P5 alliance ties variable is negative. All four variables clearly indicate that P5 ties influence the ICC decision-making. Simply, the ICC appears to be less likely to escalate its involvement when the government in question has strong ties with P5 actors. In other words P5 interests appear to deter greater ICC involvement in situations under preliminary examination.

The control variables also produce significant results; civil war is negative and significant, while both democracy and ICC ratification are positive and significant. The result for ongoing civil war may reflect the fact that the ICC is less capable of carrying out an effective investigation in a country that has ongoing conflict. Conflict makes it difficult for investigators to safely enter the country and collect information, therefore making it difficult for the OTP to build a strong enough case to progress to issuing indictments, holding hearings, etc.

The opposition model also produces strong findings in this stage (Table 2). As expected, the Africa variable is positive and significant, suggesting that the ICC is more likely to escalate its involvement against opposition groups who reside in Africa. While this finding is largely consistent with the African bias, it is important to interpret it in

combination with the results from the onset stage, which suggest that there is not an Africa bias in the preliminary examination stage. Nonetheless, we see evidence of an Africa bias in this stage.

We also observe strong results for the legal mandate variable in the opposition model. Consistent with the onset stage, both one-sided violence and the rule of law variables are significant and in the expected direction. This provides strong evidence to suggest that the Court abides by the principle of complementarity and its mandate to prosecute the gravest offenders of human rights violations, such as civilian victimization.

We see mixed results for the realist variables here. In contrast to our expectations, the pro-opposition intervention variable is positive and significant. The surprising result for this variable requires additional research to further clarify the relationship between these types of interventions and ICC involvement against opposition groups. As expected, we see that both the pro-government interventions and the P5 alliance variables are positive and statistically significant. This suggests that P5 links once again influence the behavior of the ICC. Here, however, we see that strong ties between governments and the P5 can motivate the ICC to escalate its investigations against opposition groups.

We again find mixed support for the control variables; democracy is negative and statistically significant, while ICC ratification is positive and significant as expected. In contrast, we see no support for the civil war variable.

Post-estimation Substantive Results

The statistical results provide strong support for our legal mandate argument. We also find support for the Africa and realist variables in the escalation model. In this section, we present the post-estimation results for the statistically significant variables in the escalation equation. We report the results in Table 4. As a reminder, the response variable in this model is a six category variables that measures different levels of ICC involvement

in situations. We thus use ordered probit to estimate this model. This estimator produces separate predicted probabilities for the different categories of the response variable. For the sake of parsimony, we only present the predicted probabilities for the onset of formal investigation category. This is because the predicted probabilities are largely consistent across the different levels. Further, it is likely that this represents the most significant category, as this stage is when the OTP actually moves to a formal investigation.

We first discuss the substantive results for the government model. As you can see, the predicated probability that the ICC starts a formal investigation is less than 1% outside of Africa, but this jumps to 4% when the state in question is involved in Africa. We also see strong results for the legal mandate variables. When we move the rule of law variables from low to high levels (10th to 90th percentile), we see that the predicated probability goes from 1.3% to basically zero. The Court appears to respect the complementarity principle, as it is unlikely to initiate a formal investigation when the state has a well-functioning judicial system. We see similar results for the government OSV variable. Here, the probability of ICC escalation increases from near zero to over 8% when we move from low to high levels of OSV. Thus, the OTP is far more likely to commence a formal investigation when the situation in question involves high levels of civilian victimization by the government.

The realist variables also produce substantively interesting results. The predicted probability for the pro-government intervention variable drops almost in half (9.6% to 5.5%) when there is an ongoing intervention of this type. The pro-opposition intervention variable likewise goes from 1.7% to 4.1% when there is such an intervention. Thus, it appears the intervention variables can both deter and motivate greater ICC involvement. Next, the predicted probability that the ICC investigates governments that lack P5 alliance ties is 4.2% but this decreases 2.7 percentage points to 1.5% when governments have such ties. Finally, when we move the UNGA voting measure from low to high levels

(i.e. greater voting similarity), we see that the predicted probability decreases from 5.1% to 3.2%.

We next discuss the substantive results for the opposition model (Table 4). Consistent with the government model, we observe a substantively meaningful result for the Africa variable. The predicted probability is near zero for opposition groups that are outside of Africa, but it jumps to over 9% for groups that reside within Africa. This result provides strong evidence in favor of the so-called African bias.

We also see similar results for the legal mandate variables. The baseline probability that the ICC escalates its involvement against groups from low rule of law states is 2.3% but this decreases to almost zero in high rule of law states. Once again, we see strong support for the importance of the judiciary and the corresponding principle of complementarity in driving ICC behavior. In line with the legal mandate argument, the predicted probability of a formal investigation increases from 1.9% to 4.2% when we move opposition OSV from low to high levels.

The opposition model produces weaker results for the realist variables. We see two variables that proxy government links motivate greater ICC involvement against opposition groups, although the substantive impact is relatively small. The predicted probability increases from 4.4% to 4.8% when we go from no pro-government intervention to pro-government interventions. Finally, the baseline probability that the ICC escalates its involvement to a formal investigation against the opposition is 4.4 in the absence of P5 alliance ties and this increases to 4.5% when governments share common security ties with the P5.

Conclusion

The ICC is a novel institution with the authority to investigate and prosecute individuals suspected of committing grave violations of international law. Despite a burgeoning

literature on the Court, scholars have neglected to systematically investigate when the Court becomes involved in a situation. This paper attempts to fill this important gap in the literature. To that end, we put forward two theoretical arguments to explain why the Court initiates a preliminary examination in a state and whether it escalates its involvement. Specifically, we first posited that the Court acts in accordance with its mandate and thus it is more likely to become involved in states with gross violations of human rights. We second argued that the Court's behavior follows more of a realist logic, hypothesizing that the ICC is less likely to become involved or escalate its involvement when P5 interests are at stake.

A series of empirical tests provide important insights into the applicability of each of these theoretical arguments to the behavior of the Court. First, we find fairly consistent support for most of our legal framework variables, suggesting that the law and institutional incentives help to explain when the Court becomes involved in a situation. We also observe some interesting results for the independent judiciary variable. The results indicate that complementarity is most likely to matter when it comes to the decision to escalate ICC involvement. P5 interests also play an important role, particularly in the Court's decision to escalate its involvement beyond the preliminary examination stage. Close military ties with members of the P5, as well as political/policy affinity, influence the ICC's willingness to advance its involvement in a given state. Finally, we also find some important results regarding the relationship between Africa and the Court. The ICC's so-called Africa problem is more complex than much existing commentary indicates. We find no evidence to suggest that the Court singles out Africa when it starts preliminary examinations. However, consistent with some critics, we find that the Court has clearly chosen to focus on situations in Africa when it comes to formal investigations, warrants, and trials.

The argument advanced and the empirical results have important implications for both scholars and researchers interested in the ICC and human rights more generally. We find

support for both our legal mandate and institutional constraints arguments, suggesting that the Court's decision-making is complex. Scholars debate whether international bodies are really independent or whether they simply reflect the interests of powerful states. Our analysis of the ICC, one of the most independent international institutions, suggests that even this organization cannot fully divorce itself from the influence of powerful states. In its quest for institutional legitimacy, the ICC must serve the dual goals of fulfilling its mandate and remaining cognizant of powerful states' interests. Finally, we address the so-called Africa bias in the Court and find mixed support for such claims. Our findings suggest that the critics may overstate this problem to some extent, but that some bias does exist.